Decision **DRAFT DECISION OF ALJ DUDA (Mailed 3/29/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Request for Arbitration of XO California, Inc. of an Amendment to an Interconnection Agreement with SBC California pursuant to Section 252(b) of the Communications Act of 1934, as amended.	Application 04-05-002 (Filed May 3, 2004)

OPINION MODIFYING AND CONFIRMING THE ASSIGNED COMMISSIONER'S AND ARBITRATOR'S RULING REQUIRING SBC CALIFORNIA TO MAINTAIN THE STATUS QUO PENDING THE OUTCOME OF THIS ARBITRATION

I. Summary

This order modifies and confirms the March 10, 2005 Assigned Commissioner's and Arbitrator's Ruling (Joint Ruling) which granted the motion for an emergency order to restrict SBC California (SBC) from rejecting orders for certain unbundled network elements (UNEs), as filed on March 3, 2005 and described below. The Joint Ruling is confirmed in that SBC shall continue to honor its obligations under its interconnection agreement with XO California Inc. (XO) for 60 days from the date of the Joint Ruling, or May 9, 2005, for all transport, high capacity loops, dark fiber, and unbundled local switching UNE orders relating to existing customers, including requests for moves, adds and changes. The Joint Ruling is modified to remove SBC's obligation to process such UNE orders for new customers.

On March 3, 2005, XO filed a motion in this arbitration in response to an announcement by SBC that, beginning on March 11, 2005, it would reject all new

orders for certain UNEs and would also stop processing request for moves, adds, and changes for XO's existing customers served by these UNEs. SBC bases these actions on its interpretation of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order (TRRO),[1] released February 4, 2005.

Specifically, XO seeks a Commission order temporarily restricting SBC from rejecting orders for UNEs related to transport, high capacity loops, dark fiber and unbundled local switching (including UNE-Platform, or "UNE-P") pending compliance with the change of law provisions in the existing interconnection agreement (ICA) between SBC and XO and the completion of this arbitration proceeding. XO claims that it will be unable to place new orders for these UNEs in California after March 10, 2005, or change orders to serve its existing customer base, unless this Commission takes affirmative action to prohibit SBC from rejecting such UNE orders during the pendancy of its compliance with the change-of-law provisions in its existing interconnection agreement with SBC. Unless such Commission action is taken, XO claims that it will sustain immediate and irreparable injury because it will be unable to fill service requests for existing and new customers.

As summarized in the Joint Ruling, SBC was provided the opportunity to fully brief issues pertinent to a ruling on the motion. SBC filed a response to XO's motion on March 7, 2005.

The Assigned Commissioner and Arbitrator issued their Joint Ruling on March 10, 2005 granting XO's motion and directing SBC to continue honoring

[1] *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, (rel. February 4, 2005) (TRRO).

obligations for both new and existing customers under its interconnection agreement with XO for 60 days from the date of the Joint Ruling while parties proceed to negotiate amendments to their interconnection agreement to conform to the TRRO.

On March 11, 2005, the Assigned Commissioners in the Local Competition Rulemaking (R.95-04-043) and in an arbitration (Application 04-03-014) between Verizon and various competitive local exchange carriers (CLECs) issued separate rulings on motions very similar to XO's, but relating primarily to the provision of the UNE-Platform (UNE-P). In contrast to the Joint Ruling on XO's motion that directed SBC to continue to process XO's UNE orders for new and existing customers for 60 days, the Assigned Commissioner Rulings (ACRs) in the local competition rulemaking and the Verizon arbitration did not require SBC or Verizon to process orders to serve new customers. The Local Competition and Verizon Arbitration ACRs were confirmed by the Commission in D.05-03-027 and D.05-03-028.

II. Modification and Confirmation of the Joint Ruling

A copy of the Joint Ruling is attached as Appendix A hereto. We hereby confirm the Joint Ruling, except as modified in this order, in accordance with the provisions of Pub. Util. Code § 310 which states, in part:

> "Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding opinion and order of the commission."

Because the ruling is attached to this decision, we do not repeat its full contents. In brief, the Joint Ruling found that language in the TRRO and the change of law provisions of the existing interconnection agreement supported

the use of change of law negotiations and dispute resolution to effectuate the FCC's unbundling rule changes. On that basis, the Joint Ruling concluded that SBC remains obligated to continue offering the equivalent functionality of dedicated transport, high capacity loops, dark fiber, and UNE-P for both existing and new customer arrangements under the current ICA, at prices specified by the FCC during specified twelve and eighteen month UNE transition periods. Finally, the Joint Ruling provided 60 days, or until May 9, 2005, for XO and SBC to negotiate conforming modifications to their ICA, with provision for an extension to allow time for dispute resolution under existing change of law provisions.

Given Commission action in Decision (D.) 05-03-028, which does not require SBC to provide UNE-P to new customers, the Joint Ruling should be modified to avoid an inconsistent result. If the Joint Ruling were confirmed as written, SBC would be required to provide the UNEs at issue to new customers of XO, while based on D.05-03-028, it would *not* be required to do so for new customers of other CLECs. By this order, we clarify that we do not intend for SBC to treat XO differently from other CLECs. For consistency in the UNE market, the directives of D.05-03-028 should apply to SBC's treatment of XO as well. The finding of D.05-03-028 that SBC does not have to process UNE-P orders for new customers should apply to all the UNEs raised in XO's motion. In other words, SBC is not obligated to process orders for transport, high capacity loops, and dark fiber, to serve new customers, where conditions set forth in the TRRO regarding the number of business lines served and the number of facilities-based competitors in a particular market are met, because the TRRO treats these UNEs in the same manner that it treated UNE-P, with a transition period for existing customers and a prohibition on CLECs adding new customers

as of March 11, 2005. (*See* TRRO, paras. 5, 142, 195 and 227.) As set forth in the TRRO, XO shall self-certify that any new orders for high capacity loops and transport are consistent with the FCC's requirements for competitors and business lines. (TRRO, para. 234.) While the TRRO allows SBC to challenge XO's self certification, the order requires SBC to immediately process XO's requests and continue to provision the disputed UNEs until the applicable dispute resolution process is resolved at the state commission or other appropriate authority. (*Id.*)

Therefore, the Joint Ruling is herein modified to remove the requirement that SBC process orders for dedicated transport, high capacity loops, dark fiber, and unbundled local switching (including UNE-Platform) for new customers as of March 11, 2005, unless conditions set forth in the TRRO regarding the number of business lines served and the number of facilities-based competitors in a particular market are met. Other aspects of the Joint Ruling remain unchanged in that SBC shall continue to honor obligations to provide these UNEs for existing customers, including requests for moves, adds and changes, for 60 days from the date of the initial Joint Ruling pending execution of applicable change of law provisions in accordance with its ICA with XO.

III. Comments on Draft Decision

In order to expeditiously address a potential inconsistency among similarly situated carriers, public necessity requires that the comment period for this draft decision be reduced. We therefore reduced to six days period for comments on draft decisions set forth in Pub. Util. Code § 311(g)(3) as well as the comment period in Rule 77.7. (*See* Commission's Rules of Practice and Procedure 77.7 (f)(9).) Comments were required to be filed on or before April 4, 2005.

SBC comments that consistent with D.05-03-028, the draft decision should be modified to change the deadline for new serving arrangements for existing customers to May 1, 2005 rather than May 9, 2005. We decline to make the eight day change suggested by SBC based on the circumstances of this open arbitration proceeding. The May 9 deadline was established based on the 60 day negotiation period agreed upon by SBC and XO in their existing interconnection agreement and it pertains to different UNEs than those addressed in D.05-03-028. It is reasonable to preserve the May 9 deadline, as well as the further process for dispute resolution that the ALJ has already arranged with the parties in this ongoing arbitration proceeding, because it allows the parties a reasonable period to resolve their dispute before it returns to the Commission for resolution in this arbitration.[2]

XO comments that the draft decision should be modified to clarify that the FCC's order regarding high capacity transport, loops and dark fiber only applies in certain wire centers based on the number of business lines served and the number of facilities-based competitors collocated in those wire centers. Therefore, SBC must continue to process and provision new orders for high capacity transport, loops and dark fiber consistent with the requirements set forth by the FCC in the TRRO. This modification is reasonable and has been incorporated.

[2] Moreover, we preserve the 60-day period beginning with the date of the Joint Ruling because the parties dispute the date of "written notice" under their existing interconnection agreement.

IV. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Dorothy J. Duda is the assigned Administrative Law Judge/Arbitrator in this proceeding.

Findings of Fact

1. The March 10, 2005 Joint Ruling on XO's motion, as set forth above, was made after full briefing.

2. The Joint Ruling resolves a dispute concerning SBC's announcement that, beginning on March 11, 2005, it would reject all orders for new lines utilizing various UNEs and would also stop processing requests for moves, adds, and changes for each CLEC's existing customer base using these various UNEs.

3. SBC made this announcement pursuant to its interpretation of the legal effect of the FCC's recently issued TRRO, released February 4, 2005.

4. The Joint Ruling directed SBC to continue providing the equivalent functionality of dedicated transport, high capacity loops, dark fiber, and unbundled local switching for both for new and existing customers.

5. In D.05-03-028, the Commission confirmed that SBC did not have to process CLEC orders for UNE-P arrangements to serve new customers after March 11, 2005.

Conclusions of Law

1. The March 10, 2005 Joint Ruling on XO's motion resolves issues brought before the Commission relating to disputes over SBC's obligations on and after March 11, 2005 to continue offering various UNEs, as identified in the TRRO, for new customers and for additions or other changes to lines for existing UNE customers.

2. The March 10, 2005 Joint Ruling should be modified to remove the requirement that SBC process UNE orders for unbundled local switching

(including UNE-P), dedicated transport, high capacity loops, and dark fiber for new customers, unless conditions set forth in the TRRO regarding the number of business lines served and the number of facilities-based competitors in a particular market are met, consistent with the findings and conclusions in D.05-03-028.

3. The March 10, 2005 Joint Ruling, when modified as discussed in this order, is consistent with the TRRO, and accordingly should be affirmed by the Commission in accordance with Pub. Util. Code § 310.

4. The 30-day period for comments on draft decisions set forth in Pub. Util. Code § 311(g)(1) as well as the comment period in Rule 77.7 should be reduced in view of the need to resolve a potential inconsistency of treatment among carriers, which constitutes a public necessity.

O R D E R

IT IS ORDERED that:

1. The March 10, 2005 Assigned Commissioner's and Arbitrator's Ruling granting the motion for an expedited order to maintain the status quo, attached hereto as Appendix A, is modified as set forth herein to remove the requirement that SBC California process orders for dedicated transport, high capacity loops, dark fiber, and unbundled local switching (including UNE-Platform) for new customers as of March 11, 2005, unless conditions set forth in the Federal Communications Commission Triennial Review Remand Order regarding the number of business lines served and the number of facilities-based competitors in a particular market are met.

2. The Assigned Commissioner's and Arbitrator's Ruling of March 10, 2005, as modified above, is hereby confirmed in all other respects.

This order is effective today.

Dated _____, 2005, at San Francisco, California.

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Request for Arbitration of XO California, Inc. of an Amendment to an Interconnection Agreement with SBC California pursuant to Section 252(b) of the Communications Act of 1934, as amended.	Application 04-05-002 (Filed May 3, 2004)

ASSIGNED COMMISSIONER'S AND ARBITRATOR'S RULING ON MOTION FOR AN EXPEDITED ORDER REQUIRING SBC CALIFORNIA TO MAINTAIN THE STATUS QUO PENDING THE OUTCOME OF THIS ARBITRATION

Introduction

On March 3, 2005, XO California, Inc. (XO) filed a motion in this arbitration in response to an announcement by SBC California (SBC) that, beginning on March 11, 2005, it will reject all new orders for certain unbundled network elements (UNEs) pursuant to SBC's interpretation of the Federal Communication Commission's (FCC) recently issued Triennial Review Remand Order (TRRO), released February 4, 2005.

XO seeks a Commission order temporarily restricting SBC from rejecting orders for UNEs related to transport, high capacity loops, dark fiber and unbundled local switching (including UNE-Platform, or "UNE-P") pending compliance with the change of law provisions in its existing interconnection agreement (ICA) between SBC and XO. XO claims that it will be unable to place orders for these UNEs in California after March 10, 2005, unless this Commission takes affirmative action to prohibit SBC from rejecting such UNE orders during the pendancy of its compliance with the change-of-law provisions in its existing

interconnection agreement with SBC. Unless such Commission action is taken, XO claims that it will sustain immediate and irreparable injury because it will be unable to fill service requests for existing and new customers.

Pursuant to the schedule set by the ALJ, SBC filed a response to XO's motion on March 7, 2005.

Sequence of Events Leading to the Motion

On February 4, 2005, the FCC issued the TRRO, determining that the incumbent local exchange carriers (ILECs) are not obligated to provide unbundled local switching (i.e. UNE-P), dedicated interoffice transport in wire centers meeting certain conditions, certain DS-1 and DS-3 loops, and dark fiber pursuant to Section 251(c)(3) of the Telecommunications Act of 1996. (47 USCS § 151 et seq.) The effective date of the TRRO is March 11, 2005. Regarding the required process for implementing the TRRO, the FCC stated, however: "We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by Section 252 of the Act. [footnote omitted.] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." (TRRO ¶ 233.) (Section 252 prescribes a regime for establishing ICAs and resolving disputes arising therefrom.) The FCC adopted transition plans that call for competitive local exchange carriers (CLECs) to move their embedded customers served by these various UNEs to alternative service arrangements within twelve or eighteen months of the effective date of the TRRO. The transition period varies depending on the specific UNE used to serve a customer. The FCC also prescribed the basis for pricing of these various UNEs during the transition period pursuant to Section 251(c)(3).

SBC issued several "Accessible Letters" on February 11, 2005 (attached as Exhibit A to XO's Motion) in which SBC provided notification to competitive local exchange carriers (CLECs) concerning how it intended to modify its service offerings in response to the TRRO. SBC's Accessible Letters indicate it will reject all new orders (including new lines being added to existing accounts), migration orders, or move orders for the UNEs at issue in this motion. The SBC Accessible Letter for unbundled switching states that "SBC stands ready to negotiate Commercial Agreement alternatives with you during this Transition Period." SBC includes a sample amendment to its ICA to facilitate meeting ¶ 233 or the TRRO. Under this commercial offering, SBC would continue to provide the CLEC with the ability to acquire and provision new mass market local switch port with loop combinations, but at a new price to be unilaterally determined by SBC, and higher than the UNE-P prices currently paid under the Agreement.

Parties' Positions

XO argues that SBC's proposed actions would constitute breach of the existing XO / SBC interconnection agreement in at least two respects: (1) by rejecting various UNE orders that it is bound by the ICA to accept and process and (2) by refusing to comply with the change-of-law or intervening law procedures established by the ICAs. XO argues that the TRRO requires that its change-of-law provisions be implemented through modifications to the existing ICAs. In this regard, as noted above, the TRRO (¶ 233) requires that parties "implement the [FCC's] findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." Thus, this requirement of the TRRO recognizes that some period of time may be necessary for parties to negotiate conforming changes to their interconnection agreements, using the change of law provisions in their existing ICAs.

In addition, XO argues that SBC's threatened action intends to implement SBC's proposal for new change of law language in an amended ICA, which is one issue currently under consideration in this arbitration proceeding, without waiting for the arbitrator's decision. Thus, XO contends SBC's actions flout the authority of the Commission as well as violate the TRRO and the parties' ICA.

Finally, XO maintains that SBC has identified no hardship that would result from continuing to operate under the existing ICA. Once conforming changes are negotiated, any price increase from the provision of the functionality related to UNEs that the FCC has found are no longer impaired (i.e. "declassified UNEs") can apply retroactively to March 11, 2005. Moreover, XO contends that it will be adversely impacted if SBC unilaterally rejects XO's UNE orders because XO will be required to refuse service to its customers or order UNEs as tariffed services at significantly higher prices. Thus, XO requests an order requiring SBC to maintain the status quo and comply with its obligations under the parties' ICA until the conclusion of this proceeding. Further, XO requests a prehearing conference to establish a schedule for addressing changes of law resulting from the TRRO so that the ICA amendment that will be arbitrated in this proceeding will be consistent with the most recent changes in federal law.

SBC opposes the XO motion in its entirety. SBC argues that there is no basis for the Commission to prohibit SBC from terminating its offering of the UNEs at issue in this motion effective March 11, 2005, since SBC is merely complying with the requirements of the TRRO. According to SBC, XO has ample alternatives to the UNEs at issue and the March 11, 2005 effective date of the FCC's new rules is unambiguous and unconditional. Although the FCC adopted 12 and 18-month transition periods from the effective date of the TRRO, SBC argues that these transition periods only apply to the embedded customer base

of existing UNEs and not new customer connections. (TRRO ¶ 199.) Further, SBC contends the change of law language in the existing ICA supports immediate effectiveness of the FCC's rules.

Discussion

XO's motion and SBC's response raise issues concerning the timing of implementation of the provisions of the TRRO relating to the provisioning of new UNE arrangements for transport, high capacity loops, dark fiber and unbundled local switching (i.e. UNE-P). Specifically, the question is whether the provisions of the TRRO regarding elimination of these UNEs form a sufficient basis for SBC to unilaterally implement its Accessible Letters on March 11, 2005, even though XO has not yet completed the process outlined in the ICA to negotiate appropriate conforming amendments relating to applicable changes of law under the TRRO. As a basis for resolving the issues in XO's Motion, the relevant authorities are the provisions of the TRRO and the provisions of the existing ICA outlining the sequence of events to occur in order to implement applicable changes of law.

There is no dispute that the TRRO sets new rules for the UNEs at issue. In addition, SBC's Accessible Letters and offers to negotiate commercial agreements signal that it is willing to continue to offer the equivalent functionality of these declassified UNEs, including UNE-P.[3] The dispute is over the timing of

[3] Even though the FCC's new rules end unbundling of certain UNEs under Section 251(c)(3), SBC has commercial agreements that offer arrangements functionally equivalent to these UNEs, including UNE-P, to existing and new customers. To the extent that SBC offers a particular functionality to a customer for interconnection purposes, SBC would be obligated to offer that same functionality to any requesting customer on a nondiscriminatory basis. See Sections 252(c)(2)(D) and 202 of the

Footnote continued on next page

implementation and pricing of this offering with regard to existing agreements. The critical question is whether the TRRO contemplated change of law amendments through negotiation and arbitration under Section 252 to effectuate the FCC's rule changes, as the FCC's previous Triennial Review Order (TRO)[4] decision contemplated.

After scrutiny of the TRRO and the existing agreement, and consistent with past practice when a change of law has occurred, we find the provisions in the TRRO support the use of existing change of law language in existing interconnection agreements to effectuate the FCC's unbundling rule changes.

SBC's position that it can sidestep change of law negotiations of new rates for declassified UNEs and unilaterally impose a new rate does not square with the TRRO language that carriers shall implement all FCC rule changes under Section 252 through good faith negotiations. We acknowledge the TRRO does, in fact, set different timetables for the embedded customers versus new customers with respect to the transition period for declassified UNEs that the FCC has found no longer need to be provisioned under Section 251. With regard to dedicated transport obligations (including dark fiber and entrance facilities), the TRRO states: "These [12 and 18-month] transition plans shall apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs pursuant to Section 251(c)(3) where the Commission determines that no Section 251(c) unbundling requirement exists." (¶ 142.) The

---

Communications Act. Thus, the ILEC could not lawfully withdraw an offer of a functionality to a customer that it is otherwise providing to another customer.

[4] See *In the Matter of Review of the Section 251 Unbundling Obligation of Incumbent Local Exchange Carriers, et al.*, cc Docket Nos. 01-338, 96-98, and 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003).

TRRO contains virtually identical language regarding a transition period for embedded customers served by high capacity loops, dark fiber loops, and unbundled local switching. (See TRRO at ¶¶ 195 and 227.)

SBC interprets this language as prohibiting the CLECs from adding any new dedicated transport, high capacity and dark fiber loops, and unbundled local switching after the effective date of the TRRO. SBC views this prohibition as self-effectuating. This view ignores the mandate of TRRO ¶ 233, entitled "Implementation of Unbundling," that calls for good faith negotiation under Section 252 to arrive at mutually agreeable terms and conditions for interconnection. Further, SBC contends the current change of law language in its ICA with XO supports its views. However, SBC ignores the second portion of this change of law language requiring a 60-day negotiation of disputes, as described further below.

If the FCC intended simply for a unilateral implementation of new terms dictated by the ILEC beginning on March 11, 2005, without mutual bilateral negotiation, then there would have been no point in stating: "*We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order*." (TRRO ¶ 233.) (Emphasis added.) The warning against unreasonable delay is meaningful only where a process for contract negotiation was contemplated to implement change of law provisions that could extend beyond March 11, 2005. The remedy against unreasonable delay is not to circumvent the negotiation process by unilateral implementation of the ILEC's Accessible Letters on March 11, 2005. Rather, the FCC recognized the possibility for some period for contract negotiations extending beyond March 11, 2005, but addressed the potential for abuse through delay by stating:

"We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay." (TRRO ¶ 233.)

Although we agree with SBC that the full 12 or 18-month transition period does not apply to new interconnection arrangements that replace UNE-P, the TRRO still contemplated a transitional process to pursue contract negotiations so that CLECs could continue to offer service to new customers through alternative arrangements. With respect to UNE-P, the intent of the Order was for new customers to be served by arrangements other than UNE-P after March 11, 2005, "except as otherwise specified in this Order." (¶ 227.) The exceptions "otherwise specified" are not restricted to only one particular portion of the TRRO. While voluntarily negotiated alternative agreements would be one example of an "otherwise specified" exception, they are not the only exception.

The TRRO contemplates a process for negotiating change of law provisions, including those to implement any arrangements that would replace UNE-P. We conclude that the exceptions as "otherwise specified" in the TRRO noted in ¶ 227 include reference to contracts for which change-of-law amendments have not yet been incorporated into the applicable interconnection agreements. SBC says XO is asking the Commission to flout the deadlines set forth in the TRRO. On the contrary, we find the TRRO specifically contemplated change of law negotiations to replace the declassified UNEs as of March 11, 2005. In so finding, we believe we are upholding, not flaunting, the FCC's specific instruction to undertake good faith negotiation under Section 252.

Further confirmation is set forth in the original Triennial Review Order (TRO) as to the FCC's intent requiring completion of the negotiation / arbitration of contract amendments as a prerequisite to implementing applicable change of law provisions, such as those at issue here. In discussing the transition period to

implement the change of law provisions under the original TRO, the FCC affirmed that concerns over expedited implementation of changes of law must not supersede the process for voluntary negotiations for binding interconnection agreements. In this regard, the FCC stated:

> ". . . We recognize that many interconnection agreements contain change of law provisions that allow for negotiation and some mechanism to resolve disputes about new agreement language implementing new rules. . . [W]e believe that individual carriers should be *allowed the opportunity to negotiate specific terms and conditions necessary to translate our rules into the commercial environmen*t, and to resolve disputes over any new agreement language arising from differing interpretations of our rules.
>
> Thus, to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several BOCs that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay association with renegotiation of contract provisions. (TRO ¶¶ 700.701.) (Emphasis added.)

Of course, various substantive portions of the TRO were vacated and superseded by the TRRO. Nonetheless, the principles articulated by the FCC in TRO ¶¶ 700, 701 concerning the primacy of the bilateral negotiation process under Section 252 were not vacated and remain equally applicable in the implementation of TRRO provisions. The FCC did not reverse these principles in the TRRO, and indeed, it affirmed them in ¶ 233 by stating its expectation that carriers "implement the [FCC's] findings as directed by Section 252 of the Act." Thus, we believe SBC cannot unilaterally implement the terms of its Accessible Letters on March 11, 2005 while circumventing the negotiation process to implement change of law provisions.

For UNE-P, ¶ 227 of the TRRO prohibits new UNE-P arrangements "except as otherwise specified in this order." We interpret "new arrangements" as referring to new customers, rather than to changes to the service of the existing UNE-P customer base. If the prohibition against "new arrangements" were to include any changes to the service of existing UNE-P customers, the result would tend to undermine the intent of the TRRO for an orderly transition of the existing UNE-P customer base. The FCC notes in ¶ 226 that "eliminating unbundled access to incumbent LEC switching on a flash cut basis could substantially disrupt service to millions of mass market customers, as well as the business plans of competitors." Such disruption could occur if existing UNE-P customers were unable to receive ongoing service, including processing of periodic changes in UNE-P arrangements that might be required. Thus, it is reasonable to interpret the existing UNE-P customer base as including changes to the service arrangements of such customers occurring after March 11, 2005 and up until such customers are transitioned off of UNE-P in accordance with the 12-month schedule.

Finally, we find XO will be irreparably injured through loss of customers if SBC rejects XO's orders for declassified UNEs while change of law negotiations are pending. In contrast, our actions in this ruling will not disadvantage SBC because it has offered to provide these UNE functionalities anyway and the price for them will be trued up to March 11, 2005. In our view, this approach meets the goals of not disrupting customers and competitors' business plans, as noted in TRRO ¶ 226.

Process for Implementing Applicable ICA Amendments for UNE Replacement

Since further ICA amendments are required to be completed before replacements to existing UNE arrangements can be implemented, we adopt measures to expedite that process. CLECs shall not be permitted to use negotiations as a means of unreasonably delaying implementation of the TRRO or attempting to defeat the intent of the TRRO. We adopt measures below to guard against undue delay. Accordingly, we disagree with SBC's characterization, claiming that granting XO's Motion "seeks to perpetuate the UNE-P indefinitely." (SBC Response at 28.) To the contrary, the TRRO, by referencing negotiations under Section 252, sanctions a limited period of negotiations under change of law provisions, to be monitored by state commissions, after which the prohibition against new UNE-P or other UNE arrangements would take effect.

Section 2.0 and 2.1 of the Second Amendment Superseding Certain Intervening Law, Compensation and Interconnection and Trunking Provisions of the current ICA between SBC and XO sets forth the process and sequence of events whereby changes of law are implemented.

> 2.0 Intervening Law / Change of Law:
>
> 2.1 … [I]f any reconsideration, agency order, appeal, court order or opinion, stay, injunction or other action by any state or federal regulatory or legislative body or court of competent jurisdiction stays, modifies, or otherwise affects any of the rates, terms and / or conditions ("Provisions") in this Second Amendment or the current ICAs or any future interconnection agreements(s), …the affected Provision(s) will be immediately invalidated, modified or stayed as required to effectuate the subject order, but only after the subject order becomes effective, upon the written request of either Party ("Written Notice"). In such event, the *Parties shall have sixty (60) days from the Written Notice to attempt to negotiate and arrive at an*

> *agreement on the appropriate conforming modifications.* If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the Written Notice, *any disputes between the Parties concerning the interpretation of the actions required or the provisions affected by such order shall be resolved pursuant to the dispute resolution process provided for in the current ICAs or any future interconnection agreement(s).* (Emphasis added.)

The process for dispute resolution is set forth in Section XVII "Dispute Resolution and Binding Arbitration" of the ICA.

Thus, in accordance with these provisions of the ICA, parties are to first "attempt to negotiate and arrive at an agreement" on appropriate modifications to the agreement, after Written Notice is provided by either Party. According to XO's motion, it received no Written Notice from SBC pursuant to this provision. Further, XO responded to SBC's Accessible Letters on February 18, 2005, stating they are inconsistent with applicable law and represent an anticipatory breach of the Parties' ICA. SBC responded to XO's letter on February 24, 2005, stating SBC has proposed conforming ICA language consistent with the FCC directive to implement new unbundling rules through good faith negotiations. Nevertheless, SBC reiterated its intention to reject all orders for certain UNEs in California beginning on March 11, 2005.

In any event, XO's and SBC's efforts have failed to reach agreement on the appropriate modifications to implement the change of law provision relating to the elimination of the UNEs identified in the TRRO. Until such time as the currently effective ICA is amended to incorporate such change of law provisions, SBC remains obligated to continue offering the equivalent functionality of dedicated transport, high capacity loops, dark fiber and UNE-P for both existing and new customer arrangements under the current ICA. As noted above, the FCC also prescribed the basis for pricing of these UNEs for existing customers

during the transition period as provided pursuant to Section 251 (c)(3). Until the ICA is amended to comply with new FCC rules, the pricing of new declassified UNE arrangements should likewise apply the same basis for transition pricing during the intervening period until applicable contract amendments have taken effect.

The next step prescribed under the Agreement is to move into the dispute resolution process. Absent completion of this process, there is no legal basis for SBC to impose its unilateral prices and terms for implementation as set forth in its Accessible Letters, prior to pursuing the dispute resolution process as required under the Agreement.

If the parties had completed the applicable contract amendments by now, then the new amendments replacing these UNEs could simply take effect on March 11, 2005. Since that process has not been completed, however, some additional process is required to bridge the gap between March 11, 2005 and the actual date that the contract amendment process can be completed.

The most reasonable way to bridge this timing gap is for negotiations to amend the ICAs to proceed expeditiously, and to include provision for true up of applicable charges ultimately incorporated in the ICA. Accordingly, any true up provisions that parties negotiate shall result in adjustment of billings back to March 11, 2005, such that the amended charges shall apply from the effective date of the TRRO forward. Nonetheless, the provision for new arrangements as offered by SBC in its Accessible Letters shall not automatically take effect on March 11, 2005, given that Parties have failed to reach agreement on necessary contract amendments for any replacement service that may be used for new CLEC customers.

In order to expedite the process for resolving remaining disputes and execution of necessary contract amendments, we shall allow 60 days for XO and SBC to negotiate conforming modifications to their ICA. If no agreement is reached in 60 days, XO or SBC may seek an extension of this ruling to allow time for dispute resolution of conforming modifications, as contemplated by their existing change of law provision. Given that this arbitration has been delayed already to accommodate changes in applicable law affecting UNEs, and since SBC itself suggested that the Commission could request supplemental briefing to address the FCC's final unbundling rules once issued,[5] the Commission may consider further delay of this arbitration to resolve any remaining disputes concerning provisioning of alternative interconnection arrangements to replace declassified UNEs, if parties are unable to reach agreement in 60 days. In addition, the arbitrator in this matter shall schedule a prehearing conference to discuss whether further briefing is needed to address issues arising out of the TRRO so that the ICA amendment the Commission arbitrates herein will be consistent with the most recent changes in federal law.

Therefore, **IT IS RULED** that:

1. The Motion of XO California, Inc. is hereby granted in accordance with the discussion above.

2. SBC shall continue to honor its obligations under its existing interconnection agreement with XO for 60 days from receipt by XO of SBC's Written Notice of dispute under the change of law provisions or from today's date whichever is earlier, including provision of the equivalent functionality of

[5] See SBC Response to XO's motion to withdraw petition and terminate arbitration proceedings, July 9, 2004, p. 3.

dedicated transport, high capacity loops, dark fiber, and unbundled local switching (including UNE-P), pending execution of applicable change of law provisions in accordance with the process outlined in the ICA and contemplated in the TRRO, at pricing established in TRRO ¶ 5.

3. Parties are directed to proceed expeditiously with good faith negotiations toward amending the ICA in accordance with the TRRO

4. If parties have not reached an agreement within 60 days of this ruling, XO or SBC may seek extension of this ruling to allow dispute resolution of conforming modifications to their ICA upon a showing of good faith, diligent effort at negotiation.

5. The Arbitrator shall schedule a prehearing conference to discuss whether further briefing is needed to address issues arising out of the TRRO so that the ICA amendment the Commission arbitrates herein will be consistent with the most recent changes in federal law.

Dated March 10, 2005, at San Francisco, California.

/s/ GEOFFREY F. BROWN	/s/ DOROTHY J. DUDA
Geoffrey F. Brown	Dorothy J. Duda
Assigned Commissioner	Arbitrator

CERTIFICATE OF SERVICE

I certify that I have this day served the attached Assigned Commissioner's and Arbitrator's Ruling on Motion for an Expedited Order Requiring SBC California to Maintain the Status Quo Pending the Outcome of this Arbitration on all parties of record in this proceeding or their attorneys of record by electronic mail to those who provided electronic mail addresses, and by U.S. mail to those who did not provide email addresses.

Dated March 10, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

* *

The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

(END OF APPENDIX A)